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New Foreign Investment Screening
Mechanism in Spain – updated in April 2020

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The Spanish government has introduced a **new screening mechanism** for certain investments made by **non-EU and non-EFTA residents**, based on public order, public health and public security reasons (the **Screening Mechanism**). An initial package was enacted on 17 March 2020 and an update is in force since 2 April 2020.

Whenever an acquisition is made by a non-EU and non-EFTA resident, even through legal entities incorporated in the EU, **careful prior assessment** of the potential need to undergo the Screening Mechanism is required given that the consequences of a breach of this mandatory regime are very serious. Breaches include rendering the **transaction** invalid and **without any legal effect** (until the required authorization is obtained) and **significant fines** (up to the transaction value).

This is **not a “Spain-only” matter, but a common trend across the EU**. The Screening Mechanism implements in Spain the guidance issued by the **European Commission** in March 2020, which called upon Member States to “make full use already now of its foreign direct investment screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework”.

The Screening Mechanism aligns part of the Spanish foreign investment legal framework with Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union. Certain provisions of Regulation (EU) 2019/452 — such as the list of sectors affecting public order and public security or the definition of state-owned enterprises and other similar investors — are mirrored in the regulations establishing the Screening Mechanism. That said, Regulation (EU) 2019/452 will not be applicable until 11 October 2020, and once it is in force, adjustments to the Screening Mechanism could be required to comply with EU mandatory standards.

Below are the answers to the following key questions:

- What does the Screening Mechanism consist of?
- Who is considered a “foreign investor” and what are deemed as “foreign direct investments”?
- What foreign direct investments are subject to the Screening Mechanism?
- What are the consequences of not undergoing the Screening Mechanism when required?
- What future developments can be expected.

1. What does the Screening Mechanism consist of?

The Screening Mechanism, as amended, can be summarized as follows:

- Under the ordinary procedure, **prior authorization from the Spanish Council of Ministers** (Consejo de Ministros) is required to close foreign direct investments subject to it. The legal term to issue a decision is **six months**.
- On a transitional basis, until the Screening Mechanism is further developed, a **fast-track 30-day** procedure, whose resolution is to be issued by a **lower-tier authority** (the General Directorate for International Trade and Investments —Dirección General de Comercio Internacional e Inversiones—), applies for investments (i) agreed but not closed prior to 17 March 2020; and (ii) those below EUR 5 million. Investments below EUR 1 million are not subject to the Screening Mechanism.
- Under both the ordinary and fast-track procedures, the investment will be deemed unauthorised if the relevant authority does not respond to the authorization request within the corresponding legal term.
- Details on the information and documents required to request an authorization have not been issued yet.

2. Who is considered a “foreign investor” and what are deemed “foreign direct investments”?

- Foreign **investors** are:
 - a) non-EU and non-EFTA **residents**; and
 - b) EU or EFTA residents **beneficially owned** by non-EU and non-EFTA residents. This occurs when non-EU and non-EFTA residents ultimately possess or control, directly or indirectly, more than **25%** of the share capital or voting rights of the investor, or otherwise exercise control, directly or indirectly, over the investor.
- Foreign direct **investments** are:
 - a) investments that result in a foreign investor reaching a stake of at least **10%** of the share capital of a Spanish company; and
 - b) any corporate transaction, business action or legal transaction which enables **effective participation in the management or control** of a Spanish company.

3. What foreign direct investments are subject to the Screening Mechanism?

- Not all foreign direct investments are subject to the Screening Mechanism, as this will depend on: (i) the sector in which the target carries out its business; and (ii) the personal circumstances of the foreign investor, regardless of the business of the target.
- **Objective criteria:** foreign direct investments in the following **sectors** are subject to the Screening Mechanism:
 - a) **Critical infrastructure**, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure.
 - b) **Critical technologies and dual use items** as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies.
 - c) **Supply of critical inputs**, including energy or raw materials, as well as **food security**.
 - d) Sectors with **access to sensitive information**, including personal data, or the ability to control such information. Every Spanish company processes personal data, however the law fails to establish which particular activity presents systemic risks in terms of security and public order.
 - e) **Media**.
 - f) **Other** sectors designated by the Spanish government from time to time that may affect public security, order or health (currently none).

- **Subjective criteria:** foreign direct investments by the following foreign **investors** are also subject to the Screening Mechanism, regardless of the business of the target:
 - a) Investors directly or indirectly controlled by the government, including state bodies or armed forces, of a non-EU/EFTA country. The recitals of the first Royal Decree Law introducing the Screening Mechanism expressly refer to sovereign wealth funds as entities whose investment would be subject to screening.
 - b) Investors that have already made an investment affecting national security, public order or public health in another EU Member State, including an investment in any of the above-mentioned sectors.
 - c) Investors subject to ongoing judicial or administrative proceedings for engaging in illegal or criminal activities.

4. What are the consequences of not undergoing the Screening Mechanism when required?

- Gun-jumping the mechanism will render the **transaction** invalid and **without any legal effect**, until the required authorization is obtained.
- In addition, **finés** up to the value of the investment could be imposed

5. What future developments can be expected?

- The first package regulating the Screening Mechanism authorised the Spanish Council of Ministers to lift the Screening Mechanism. This authorisation was removed in the second package establishing the current terms of the Screening Mechanism.
- Regulations issued by the Spanish government should be approved to further develop the Screening Mechanism – in particular, to set the de minimis amount under which foreign direct investments are not subject to the Screening Mechanism (currently EUR 1 million, until these regulations are approved).
- Even though the latest legislation on foreign direct investment has been passed during the current COVID-19 crisis, they might be **expected to remain in force in the long-term**.
- Since 11 October 2020, adjustments to adapt the Screening Mechanisms to implement Regulation (EU) 2019/452 might also be required.

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As there are many open questions on how this new Screening Mechanism should be interpreted, a **cautious approach is strongly recommended**, specifically with regard to the scope of the definition of beneficial ownership of EU or EFTA residents by non-EU and non-EFTA residents, sectors subject to the Screening Mechanism, the definition of what effective participation in the management or control of a Spanish company means, the situation of foreign investments which already hold a shareholding interest of over 10% and who wish to increase it (or maintain it, through share capital increases with pre-emptive subscription rights) and many others. To answer these questions, we will need to bear in mind, on the one hand, the principles and rules within which the new regulation is encompassed, and on the other, the intended purpose for the new Screening Mechanism to counteract “the real threat for listed Spanish companies” affected by the stock market slumps of the last few days of “acquisition operations (...) by foreign investors”, a threat that also affects “unlisted companies whose equity value is being diminished”.

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